Who Deserves to Die? A Time to Reconsider

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The Court of Appeals wrongly declared New York's death penalty unconstitutional, but rightly declared it in need of reform. No doubt the Legislature and Governor George E. Pataki can, as they have announced they are prepared to do, easily remove and replace the singularly stupid jury deadlock provision, which informs a jury split between life-without-parole, or death, that unless they unanimously agree on one or the other, the judge must sentence the convicted murderer to an even less severe life with parole eligibility. Rather than embrace a quick fix as the Legislature and governor seem intent on doing, however, we should pause and reflect, deliberate and debate. This is a rare opportunity to rethink, revise, refine New York's death penalty so that we may more nearly impose the death penalty on all, but only those who truly deserve to die.

Abolish Capital Felony Murder (NYPL 125.27 vii): First, New York should drop the felony-murder aggravating circumstance. Felony murder -- the most common death penalty situation -- covers many
different types of killers and killings. Across the United States, robbery (and burglary) have put more killers on death rows than all other aggravating circumstances. Instinctively and morally, we feel that killing for money makes a murder worse. And the statute specifies a pecuniary motive as a separate aggravating circumstance. Robbers almost always rob for money, but they rarely kill for it. There is nothing about a robbery, alone, that makes an intentional killing that accompanies it even worse. Where the felony-murderer truly deserves to die, other aggravating circumstances such as rape -- properly understood as torture -- will, and should make that murderer death eligible. But intentional felony murder as a capital offense should be abolished.

Refine the Witness-Killing Aggravator (NYPL 125.27 v): Many robber/murderers intentionally kill their victims to eliminate them as witnesses. Rightly New York's law specially condemns killing a witness. The current statute categorically makes death-eligible a person who intentionally kills a witness (or a member of the witness's family) in order to prevent future testimony, or as retribution for previous testimony. At first blush this provision seems morally supportable, either as an added deterrent or to punish the calculating selfishness by which a killer marginally increases his odds of escaping lawful punishment at the price of an innocent citizen's life. But the statute makes no distinction between the innocent, unresisting victim of a robbery who peacefully surrenders his wallet and is killed to prevent his possible future testimony, and the co-felon (or paid informant) who flips the script, violating the street code, cooperating with the government to pin it on his fellow criminal, often his partner in crime. It does not distinguish between the innocent witness and the snitch. The snitch deserves witness protection, but his killer does not thereby deserve to die. If we are to confine the death penalty to the worst of the worst, the statute should be narrowed to the intentional killing of an unresisting innocent witness.

Redefine Torture (NYPL 125.27 x): Unquestionably, a sadist who tortures his helpless victim to death, just for the fun of it, is among the worst of the worst, and absent compelling mitigating circumstances, deserves to die. Torture provokes near universal condemnation, even among killers themselves, providing us retributivist advocates of the death penalty our strongest case. But New York overly restricts torture, by requiring proof that the killer relished or took pleasure in the infliction of extreme physical pain. This definition shifts the focus from the victim. In the street, they sometimes kidnap a victim, chop off body
parts and mail them to the family to extract ransom. While not taking pleasure, this coldly calculating selfishness can be as frightening and vicious as passionate sadism. At one point Governor Pataki proposed expanding New York's death penalty statute to include extreme pain imposed to extract information, and I would add or to obtain anything of value. In short, a killer who rapes, mutilates or kills in a drawn-out painful procedure has tortured his victim, whether or not he takes pleasure.

Add Depraved Indifference Recklessness (Amend 125.27 i): Cruelty -- the essence of what we most condemn -- has long since meant not only taking pleasure, but at the other extreme, a cold callous indifference to human life. A person who shoots a machine gun into a crowd with no particular target, not caring who, or how many innocent people live or die; a pharmacist who dilutes patients' chemotherapy to make extra money, callously indifferent as to whether those denied their treatment live or die an agonizing death; a man who rapes three children 9, 7, 5 while he is HIV positive and knows it, not caring whether they live or die, all should be condemned as the worst of the worst. The U.S. Supreme Court specifically held that such a depraved indifference recklessness may be sufficiently heinous to warrant death. New York's current death penalty statute, however, rejects this, specifically requiring an intent to kill. New York's Legislature should include a killer's knowingly subjecting a victim to a grave risk of death, combined with a depraved indifference to human life as a culpable mental state sometimes deserving of death.

Refine Killing From a Pecuniary Motive: Eliminate Class Bias (125.27 vi): Like most every other state with a death penalty, New York specifically condemns paid assassins, and those who hire them. And they should. But do we thoroughly condemn killing as a business decision? We never execute, and rarely prosecute corporate executives, no matter how callous and lethal their actions. In order to deter such deadly behavior, and diminish class bias, but mostly because they deserve it, New York should specifically condemn corporate safety directors and other executives -- red collar killers I call them -- who, with a depraved indifference to human life, run deadly workplaces or manufacture deadly products, knowingly and recklessly exposing unsuspecting employees, consumers or local residents to a grave risk of death which kills them, all from the 'best' of motives -- the profit motive.
Rethink Killing to Prevent Law Enforcement (125.27 i, xii): Most states single out cop killers for capital punishment. Supporters point out that the police put their lives on the line for us, that those who would kill a cop would kill anyone, and that an attack on law enforcement is an attack on law itself and threatens the whole criminal justice system. Those who kill police because they are police do make war on the People and deserve to die. But an armed robber who does not initiate the gun battle, and intentionally shoots a pursuing police officer who is shooting at him, although a murderer, is not the worst of the worst, and without more, does not deserve to die.

New York also specially condemns killing a judge, but only because such victim was, at the time of the killing, a judge. Why not also include prosecutors? And by the logic that condemns attacks on the criminal justice system, killing a juror to prevent a guilty verdict or in retaliation is worst of all. Only a few states aggravate for killing jurors; New York should be among them.

Add Especially Vulnerable Victims: Many states but not New York single out other victims -- children, the elderly, the handicapped -- whose intentional killing especially deserves to be condemned. Are the lives of some victims more valuable than the rest? No. Perhaps we imagine greater pain attaching as a helpless victim experiences his own helplessness. Ultimately, however, we advocates of a generic especially vulnerable victim aggravator, support it not because the victims' lives are more valuable, but because their deaths reveal the cowardly and despicable nature of killers who prey on them. Retributively, advantage taking -- extreme selfishness combined with extreme cowardice -- qualifies as the worst of the worst. Besides, the universal innocence and unrealized potential of childhood does make most of us feel it somehow worse to kill them.

Eliminate the Lifer who Kills (125.27 iv; ix): New York along with many but not all death penalty states singles out a prisoner serving a life sentence (and separately a convicted murderer) who kills again. Supporters justify this aggravator one of two ways: Either they claim lifers have nothing left to lose and are therefore a uniquely undeterrable group. A threat of death, and only a threat of death will keep them in check. Or, supporters claim, a lifer by this latest intentional killing demonstrates that killing is not an aberration, but an essential part of his character. These arguments are out of touch with reality. Thirteen years inside Lorton prison interviewing convicted killers who serve life sentences and do not kill the
unarmed guards they hate has taught me that lifers develop the best hustles and the relatively good life inside. Lifers have the most to lose and are most deterrable by a simple threat: transfer to a supermax. The lifer aggravator should be dropped.

Nor does the lifer or convicted murderer who kills again demonstrate he is the worst of the worst. Inside Central, a lifer worked in the kitchen delivering trays of food to other prisoners on lockdown. Without informing or consulting him, another prisoner had laced a peanut butter sandwich with cocaine to be delivered to his buddy by the unsuspecting lifer. Someone else in the kitchen snitched. Busted for transporting drugs, the lifer was himself locked down, stripped of his job and other perks he had worked years to acquire. When he paid to have the drug smuggler killed, he committed intentional murder. He deserved to be punished -- transferred to a more punitive setting -- but he did not deserve to die. A lifer who kills again should not, for that reason alone, be eligible for death. The aggravator should be eliminated.

**Now Is the Time**

This discussion has barely scratched the surface of reform. More can and should be done. Besides, it will be years before a condemned killer's case reaches the state's highest court, and by that time perhaps we will have a majority who will honestly feel constrained to defer to the people's representatives to better identify in advance the worst of the worst and proceed to execute those who most deserve to die.

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